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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE: CATHODE RAY TUBE (CRT) ANTITRUST LITIGATION	Master File No. 3:07-cv-05944-SC MDL No. 1917
This document relates to: *Tech Data Corp., et al. v. Hitachi, Ltd., et al.*, No.13-cv-00157; *Siegel v. Technicolor SA, et al.*, No.13-cv-05261; *Sears, Roebuck and Co., et al. v. Technicolor SA*, No. 13-cv-05262; *Best Buy Co., Inc., et al. v. Technicolor SA, et al.*, No. 13-cv-05264; *Schultze Agency Services, LLC v. Technicolor SA, Ltd., et al.*, No. 13-cv-05668;	**PLAINTIFFS' OPPOSITION TO MITSUBISHI'S MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO DIRECT ACTION PURCHASERS' SHERMAN ACT DAMAGES CLAIMS BASED ON CRT PRODUCT PURCHASES FROM NEC CORPORATION AND NEC-MITSUBISHI ELECTRIC VISUAL SYSTEMS CORPORATION** Judge: Hon. Samuel P. Conti Court: Courtroom 1, 17th Floor Date: February 6, 2015 Time: 10:00 A.M.

Costco Wholesale Corporation v. Technicolor SA, et al., No. 13-cv-05723;

Electrograph Systems, Inc., et al. v. Technicolor SA, et al., No. 13-cv-05724;

P.C. Richard & Son Long Island Corporation, et al. v. Technicolor SA, et al., No. 13-cv-05725;

Office Depot, Inc. v. Technicolor SA, et al., No. 13-cv-05726;

Interbond Corp. of Am. v. Technicolor SA, et al., No. 13-cv-05727;

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MEMORANDUM OF POINTS AND AUTHORITIES

The undersigned Direct Action Plaintiffs (collectively, "DAPs") hereby oppose Defendants' Motion for Partial Summary Judgment as to DAPs' Sherman Act Damages Claims Based on CRT Product Purchases from NEC Corporation and NEC-Mitsubishi Electric Visual Systems Corporation [Dkt. 3020-4] (the "Motion").

I. INTRODUCTION

At the motion to dismiss stage, this Court discussed the significant evidence of Mitsubishi's participation in the CRT price-fixing conspiracy—including admissions from coconspirator Samsung SDI which directly implicate Mitsubishi as a participant in the illegal price-fixing cartel. Defendants' Motion is an effort to evade liability for millions of dollars in Sherman Act damages caused by Mitsubishi's participation in the CRT price-fixing conspiracy—damages which flowed through two channels of distribution relating to Mitsubishi's owned and controlled joint venture.

Specifically, Defendants contend that the long-established ownership or control exception to *Illinois Brick*, recognized over thirty years ago in *Royal Printing Co. v. Kimberly Clark Co.*, 621 F.2d 323 (9th Cir. 1980), does not apply to two categories of purchases—(1) CRT finished product purchases from a joint venture (NMV) between Mitsubishi (a Defendant and alleged conspirator in this action) and NEC; and (2) CRT finished product purchases from various entities undisputedly owned by NEC. Defendants' Motion applies the wrong legal standard and largely ignores the undisputed facts evidencing Mitsubishi's ownership stake and control over NMV.

With respect to the legal standard, Defendants conspicuously fail to acknowledge the binding Ninth Circuit cases establishing the contours of the ownership or control exception. Instead, Defendants inexplicably seek to rely on and apply a decision from the Eastern District of New York which neither cited nor applied any Ninth Circuit precedents on the meaning of ownership or control (and itself has never been cited by any other court on this point). Absent

from Defendants' brief is any meaningful discussion of the Ninth Circuit's holding in *In re ATM Fee Antitrust Litigation*, 686 F.3d 741 (9th Cir. 2012) ("*ATM Fee*"), the decisions of Judge Illston in the *In re TFT-LCD (Flat Panel) Antitrust Litigation*, or even this Court's own opinion regarding Defendants' earlier motion for summary judgment on the application of the exception in this very case.

Under binding Ninth Circuit precedent, DAPs must show "an ownership or control relationship between each challenged vendor and an alleged conspirator." *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-md-1827, 2012 WL 7062366, at *3, *4 (N.D. Cal. Dec. 26, 2012) ("*TFT-LCD II*") (relying on *ATM Fe*e as the governing legal standard). As shown below, the evidence adduced in this case plainly supports the conclusion that the exception is satisfied with respect to these purchases.

A. DAPs Have Sherman Act Standing for Purchases From NMV.

Of the Sherman Act damage claims addressed in Defendants' Motion, the majority is attributable to purchases DAPs made from NMV [redacted] This ownership stake, standing alone, satisfies the ownership or control exception as set forth by the Ninth Circuit in *ATM Fee* and *Royal Printing*. In addition, this ownership interest allowed Mitsubishi to exercise control over all of NMV's business decisions, thus providing separate grounds for satisfying the control prong of the exception.

Even setting aside Defendants' errors regarding the proper governing legal standard regarding the ownership or control exception, the facts of this case clearly demonstrate that Mitsubishi did in fact own and control NMV. [redacted] Mitsubishi owned NMV and was also able to exercise control over NMV, as evidenced by the following undisputed facts:

[redacted]

B. DAPs Have Sherman Act Standing With Respect to Purchases From Other NEC Entities.

DAPs also purchased CRT products from wholly- or majority-owned subsidiaries of NEC—Mitsubishi's joint venture partner in NMV. The Motion also seeks to improperly preclude DAPs from recovering any Sherman Act damages with respect to these purchases from NEC entities.

The ownership or control exception, the Ninth Circuit has stated, is designed to ensure that a Sherman Act remedy exists where an ownership or control relationship between a conspirator and a purchaser of price-fixed goods creates a situation in which there is no realistic possibility of suit. *See ATM Fee*, 686 F.3d at 756. Under the facts of this case, it is quite clear that NEC's ownership and control relationship with its joint venture partner, Mitsubishi, would preclude it from bringing suit to recover for the CRT price-fixing conspiracy. At the very least, DAPs have shown that there is a genuine dispute of material fact such that summary judgment should be denied.

Defendants include only a cursory seven lines of argument in support of their incorrect

contention that there is no ownership or control relationship such that DAPs' Sherman Act standing is precluded with respect to NEC purchases. Motion at 6. Tellingly, the only evidence set forth in support of Defendants' position is the fact that Mitsubishi "has no ownership interest in [NEC]." *Id.* But there has never been any dispute about this fact, and DAPs have never relied on this fact as the basis for standing under the ownership and control exception.

To the contrary, the relevant legal inquiry, ignored by Defendants, is whether an ownership or control relationship involving Mitsubishi forecloses any "realistic possibility of suit." *ATM Fee*, 686 F.3d at 756; *see also In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-md-1827, 2012 WL 5869588, at *3 (N.D. Cal. Nov. 29, 2012) ("*TFT-LCD I*"); *TFT-LCD II*, 2012 WL 7062366, at *3. Directly bearing on this point is the ownership and control relationship between Mitsubishi and NEC [redacted] in the CRT and LCD industries which precludes any "realistic possibility of suit," and, as such, provides DAPs standing. *ATM Fee*, 686 F.3d at 756.

Moreover, DAPs have presented evidence that this ownership and control relationship has indeed resulted in this precise outcome. There is no evidence that NEC has, over the course of seven years since the CRT cartel's illegal activities came to light, sued anyone to recover damages caused by the CRT conspiracy. Thus, Mitsubishi's baseless claims about NEC being a victim who was "duped" by Mitsubishi's participation in the CRT conspiracy, Motion at 7, ring utterly hollow. Defendants have not rebutted this evidence (much less met their burden on summary judgment), and the Motion should be denied.

II. RELEVANT PRIOR ORDERS

Defendants have already moved for summary judgment regarding the application of the ownership or control exception to Sherman Act claims in this case. Dkts. 1013 (Dec. 12, 2011), 1274 (July 24, 2012). The Court denied Defendants' motion. Dkt. 1470 (Nov. 29, 2012). In so doing, the Court held that Sherman Act standing exists so long as a plaintiff "paid a passed-on overcharge to a non-conspiring direct purchaser owned or controlled by any alleged

conspirator." *Id.* at 16. Underpinning this ruling was the conclusion that *ATM Fee* "affirmed and applied" the *Royal Printing* ownership or control exception. *Id.* at 21. Purchasers of CRT finished products, the Court held, "have standing to sue insofar as they purchased FPs [finished products] incorporating the allegedly price-fixed CRTs from an entity owned or controlled by any allegedly conspiring defendant." *Id.* at 16.

This prior order unequivocally establishes the governing legal standards regarding the exception—a standard that is ignored or, at best, incorrectly applied in Defendants' Motion. Based on these standards, along with binding Ninth Circuit precedent, summary judgment should again be denied.

III. STATEMENT OF MATERIAL FACTS

A. Mitsubishi Participated in the CRT Price-Fixing Conspiracy.

As demonstrated by DAPs' concurrently filed opposition to Mitsubishi's motion for summary judgment on liability[1] and this Court's prior ruling on Mitsubishi's motion to dimsmiss DAPs' complaints, the evidence in this case shows that "Mitsubishi executives participated directly in the conspiracy, and that they agreed to keep their participation secret, including by using coded references to the participating companies." Dkt. 2439 (Mar. 13, 2014) at 6. [redacted]

B. Mitsubishi and NEC Formed NMV in 2000, and Together Owned and Controlled NMV.

Defendants' Motion correctly sets forth a few of the fundamental facts surrounding

[1] Mitsubishi has moved for summary judgment on this liability issue in a separate motion for summary judgment. *See* Dkt. 3026. DAPs are opposing that motion, and refer to and incorporate that opposition herein.

Mitsubishi's and NEC's combined ownership of their joint venture, NMV. For example, Defendants expressly acknowledge the following undisputed facts regarding Mitsubishi's ownership and control over NMV:

[redacted]

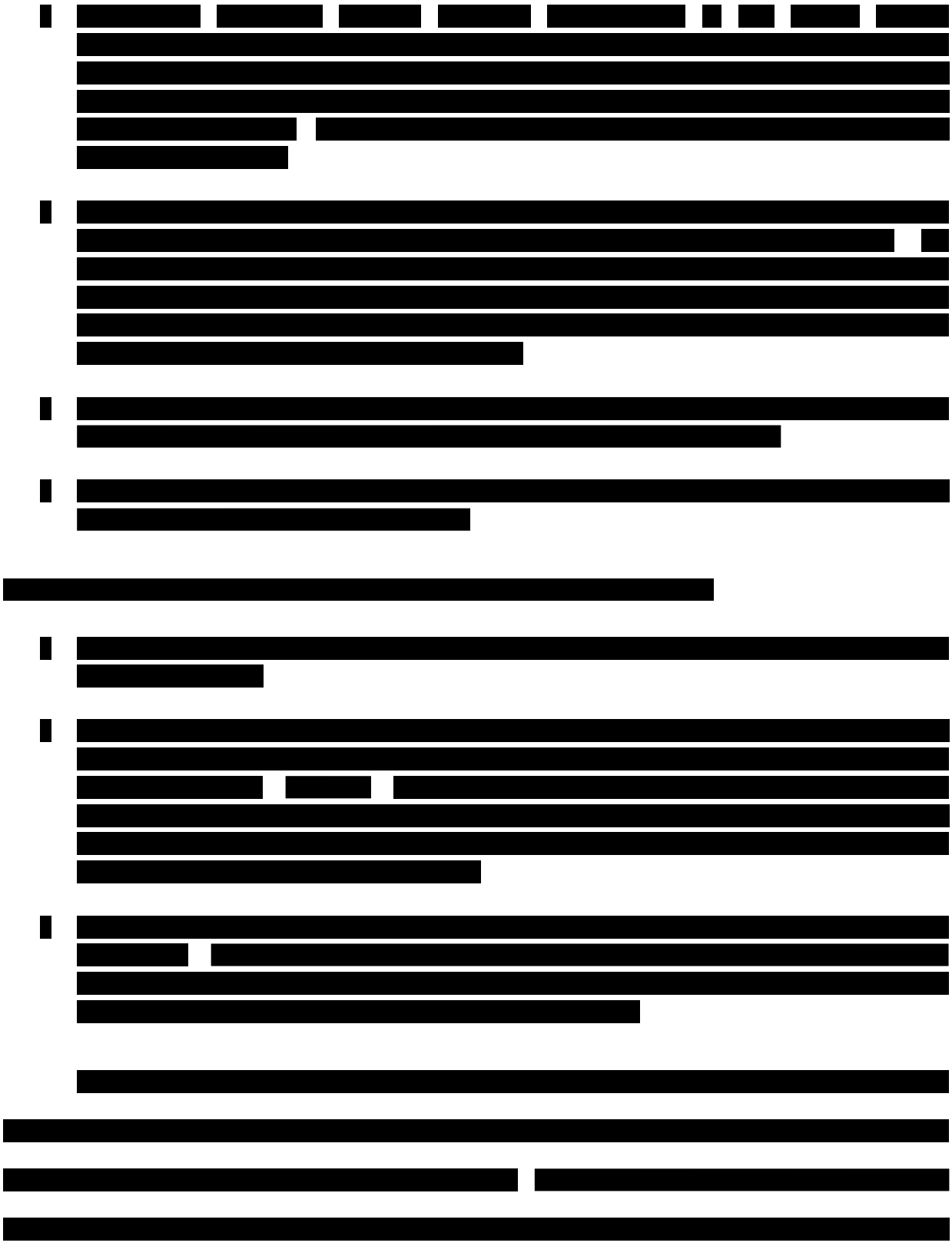
These basic facts standing alone, which are openly acknowledged and admitted by Defendants, establish that Mitsubishi and NEC jointly owned and controlled NMV. Yet, the facts which Defendants chose to present to the Court and address in their Motion only scratch the surface of the evidence that demonstrates the wide scope of the ownership and control relationship that existed between Mitsubishi and NMV.

[redacted]

[2] Citations of "Exh." refer to exhibits attached to the Iovieno Declaration submitted herewith. For clarity's sake, in contrast to Defendants' exhibits (which are labeled alphabetically), exhibits to the Iovieno Declaration are labeled numerically.

[redacted]

[redacted]



[redacted]

[redacted]The record in this MDL litigation plainly reflects that neither NEC nor any of its subsidiaries have initiated any lawsuit relating to the CRT conspiracy. Indeed, there is no evidence that NEC or its subsidiaries have ever sued for the CRT conspiracy in any forum—not in the United States, not in Japan, not in Europe, not anywhere.

C. DAPs Purchased CRT Finished Products From NMV.

DAPs purchased CRT computer monitors from NMV[redacted] Defendants' Motion

[3] [redacted]

[redacted]

correctly treats these purchases as having been made from NMV itself.[4] Consistent with Defendants' concession, DAPs refer to these purchases as having been made from NMV itself.

D. DAPs Purchased CRT Finished Products From NEC Entities.

The second category of purchases addressed in the Motion involve DAPs' purchases of CRT products from various majority- or wholly-owned subsidiaries of NEC Corp (collectively, the "NEC Vendors"). The NEC Vendors are indisputably owned by NEC Corp., and Defendants do not address and thus properly concede for purposes of this Motion that so long as DAPs establish a sufficient ownership or control relationship between NEC and Mitsubishi, they have Sherman Act standing for their purchases from the NEC Vendors.

IV. LEGAL STANDARD

A. Summary Judgment Standard of Review.

Entry of summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment should be granted if the evidence would require a directed verdict for the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986). "A moving party without the ultimate burden of persuasion at trial—usually, but not always, a defendant—has both the initial burden of production and the ultimate burden of persuasion on a motion for summary judgment." *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Companies, Inc.*, 210 F.3d 1099, 1102 (9th Cir. 2000). "In order to carry its burden of production, the moving party must either produce evidence negating an essential element of the nonmoving party's claim or defense or show that the nonmoving party does not have enough evidence of an essential element to carry its ultimate burden of persuasion at trial." *Id*. "In order to carry its

[4] In other words, Defendants do not address (and thus correctly concede) the fact that for purposes of Sherman Act standing analysis under *Illinois Brick*, a purchase from NEC-Mitsubishi Electronics Display of America, Inc. is effectively the same thing as a purchase from NMV.

ultimate burden of persuasion on the motion, the moving party must persuade the court that there is no genuine issue of material fact." *Id*.

B. Legal Standards Governing the Ownership or Control Exception to *Illinois Brick*.

At issue in the Motion is whether the long-established ownership or control exception to *Illinois Brick* applies to DAPs' claims based upon purchases from NMV and NEC.

Initially, it is appropriate to address one apparent misconception held by Defendants, who claim that DAPs seek to hold Mitsubishi "responsible for sales made by [NEC]." Motion at 1. Contrary to Defendants' characterization, DAPs are not singling out Mitsubishi for liability with respect to these purchases. Instead, DAPs are pursuing Sherman Act damages *from all Defendants*, pursuant to joint and several liability, with respect to purchases from NMV and NEC. The Motion is not, as Defendants misguided assertion seems to indicate, about vicarious liability, alter ego liability, corporate veil piercing, or any other such doctrine.[5]

The ownership or control exception was first recognized over thirty years ago by the Ninth Circuit in *Royal Printing*, 621 F.2d 323 (9th Cir. 1980) (as this Court held in its prior summary judgment order, Dkt. 1470), and was recently reaffirmed in *ATM Fee*, 686 F.3d 741 (9th Cir. 2012). Under the ownership or control exception, a plaintiff establishes Sherman Act standing so long as it shows "an ownership or control relationship between each challenged vendor and an alleged conspirator." *TFT-LCD II*, at *4 (citing and relying on *ATM Fee*); *see also* Dkt. 1470 at 22 ("Defendants have not carried their summary judgment burden of showing an absence of evidence in support of applying the ownership and control exception."). The policy underlying the ownership or control exception established in *Royal Printing* (and affirmed in *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133 (9th Cir. 2012) and *ATM*

[5] Because the application of the ownership or control exception relates to the scope of each and every coconspirator's joint and several liability—not just Mitsubishi's liability—all Defendants are parties in interest to the Motion.

Fee) is to prevent price-fixers from shielding themselves from liability by making sales through a non-conspiring subsidiary or affiliate. Barring plaintiffs that purchased directly from subsidiaries or affiliates of the conspirators from bringing suit "would eliminate the threat of private enforcement," by "clos[ing] off every avenue for private enforcement of the antitrust laws in such cases," *Royal Printing*, 621 F.2d at 326 n.7, 327. In the words of the Ninth Circuit, "[t]his would be intolerable." *Id.* at 327.

The test of ownership or control is, by its very terms, disjunctive—*i.e.*, if either ownership *or* control is established, DAPs may proceed with their claims. *See, e.g.*, *ATM Fee*, 686 F.3d at 756-57 (analyzing control separate from ownership).[6] As to the ownership prong of the exception, the analysis of *ATM Fee* firmly indicates that anything more than a minority ownership interest inherently satisfies the test. In *ATM Fee*, when the Ninth Circuit considered the "control" prong of the exception, it specifically observed that *minority* stock ownership is relevant to that inquiry. *Id.* Given that a minority ownership interest relates to control, the inescapable implication is that a greater-than-minority stake shows ownership.

As to the control prong of the exception—which is separate from and independent of the ownership inquiry—"modes of control that might qualify for the control exception include 'interlocking directorates, minority stock ownership, loan agreements that subject the wholesalers to the manufacturers' operating control, [or] trust agreements.'" *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1182 (N.D. Cal. 2009) (quoting *Howard Hess Dental Laboratories Inc. v. Dentsply International, Inc.*, 424 F.3d 363, 372 (3d Cir. 2005) (in turn quoting *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 605 (7th Cir. 1997))).

[6] This disjunctive test is a sensible one and is fully consistent with the ordinary definition of ownership, which operates "regardless of any actual or constructive control." Black's Law Dictionary (Tenth Ed.) at 1280.

V. ARGUMENT

A. Purchases From NMV Fall Squarely Within the Ownership or Control Exception to *Illinois Brick*.

In order to have standing for their purchases from NMV, DAPs will need to prove at trial two fundamental facts: (1) that Mitsubishi conspired; and (2) that Mitsubishi was in an ownership or control relationship with NMV which satisfies the exception to *Illinois Brick*. DAPs have presented the Court with a mountain of evidence on both points—essentially all of which is unrebutted by Defendants—and summary judgment should thus be denied.

1. *Mitsubishi conspired.*

The first step of the ownership or control analysis asks whether Mitsubishi actually participated in the CRT conspiracy. On that count, the evidence in this case plainly shows that Mitsubishi participated in the CRT price-fixing cartel. Indeed, as the Court found in its order regarding Mitsubishi's motion to dismiss the DAPs' complaints, "[o]ne defendant in this case [Samsung SDI] recently gave extensive details regarding Mitsubishi's participation in the conspiracy, which had, until November 2013, been kept secret." Dkt. 2439 at 6. As the Court further stated, "[t]he defendant [Samsung SDI] stated very specifically that Mitsubishi executives participated directly in the conspiracy, and that they agreed to keep their participation secret, including by using coded references to the participating companies." *Id.*

[redacted]

As demonstrated in DAPs' opposition to Mitsubishi's motion on liability, the evidence

[7] As stated in Section III.A, *supra*, a full recitation of the evidence of Mitsubishi's participation in the conspiracy is set forth in DAPs' opposition to Mitsubishi's motion on this issue.

in this case plainly supports the finding that Mitsubishi participated in the conspiracy. As a result, the only remaining issue to be decided for purposes of this Motion is whether Defendants have met their burden of showing that there is no dispute of material fact regarding the existence of an ownership or control relationship which satisfies the exception to *Illinois Brick*. As established below, they have not.

2. *Mitsubishi's ownership interest in NMV satisfies* ATM Fee.

Defendants do not contest the fact that Mitsubishi held [redacted] ownership interest in NMV. Motion at 3. Defendants do, however, misstate the relevant legal standard by asserting that DAPs can only succeed if they show that Mitsubishi (1) has "a majority or controlling interest in NMV"; *and* (2) that Mitsubishi "had the power to exercise control over NMV's pricing decisions." Motion at 7. This is simply not the law; instead, Defendants are improperly trying to convert the exception from one of ownership *or* control to one of ownership *and* control.[8]

Contrary to Defendants' unsupported assertions, Mitsubishi's ownership interest, standing alone [redacted] and is sufficient to satisfy the ownership prong of the ownership or control exception.[9] This conclusion is mandated by the analysis in *ATM Fee*. In *ATM Fee*, the Ninth

[8] Without any explanation or support from the numerous Ninth Circuit cases that apply the *Royal Printing* exception, Defendants are apparently asking the Court to conduct an analysis that would completely ignore Mitsubishi's [redacted] ownership interest in NMV (which on its own satisfies the ownership prong of the exception), and also to overlook the numerous indicia of control (*e.g.*, stock ownership, overlapping directorates, and the power to appoint board members) that the Ninth Circuit has deemed pertinent to the control inquiry.

[9] Defendants themselves expressly acknowledge that ownership and control during the conspiracy period is highly relevant to this determination. *See* Defendants' Motion for Partial Summary Judgment With Respect to DAPs' Alleged Direct Damages Claims Based on Purchases From Sanyo [Dkt. 3009-4] (arguing that "evidence of ownership or control during the relevant period is critical to whether the ownership or control exception applies to the *Illinois Brick* rule") (quotations omitted) (emphasis omitted). Defendants go on to incorrectly (continued . . .)

Circuit recently held that minority stock ownership (totaling approximately 10%), without more, was insufficient to satisfy the ownership exception. *ATM Fee*, 686 F.3d at 757 (*minority* stock ownership relevant also to the control inquiry); *see also In re Lithium Ion Batteries Antitrust Litigation*, No. 13-md-2420, 2014 WL 4955377, at *25 n.24 (N.D. Cal. Oct. 2, 2014) (same); *Sun Microsystems Inc. v. Hynix Semiconductor Inc.*, 608 F. Supp. 2d 1166, 1180 (N.D. Cal. 2009) (same); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 605 (7th Cir. 1997) (same).

If the Ninth Circuit felt that greater-than-minority stock ownership (*i.e.*, 50%) might not qualify as sufficient ownership, it would have said so—or it at least would have excluded the word "small" when holding that a "small ownership percentage" relates to *control*. *See ATM Fee*, 686 F.3d at 757. Simply put, the Ninth Circuit's holding in *ATM Fee* undeniably supports the conclusion that an ownership interest of 50% or greater [redacted] satisfies the exception.

ATM Fee's analysis is no accident, [redacted] *Cf. ATM Fee*, 686 F.3d at 756 ("[W]hether a realistic possibility of suit exists[] depends on the existence of

(. . . continued)
argue in that brief that ownership or control during the conspiracy period is the *only* relevant fact for the trier of fact to consider. What no one disputes, however, is that ownership or control during the conspiracy period suffices.

ownership or control between the direct purchaser and the seller.").

[redacted] DAPs submit that the ownership prong of the ownership or control exception to *Illinois Brick* is satisfied, and that for this reason alone they have established standing to pursue their Sherman Act claims with respect to purchases from NMV. As a result, the Court need not address the issue of Mitsubishi's control over NMV. In any event, as set forth below, the record evidence unequivocally shows that Mitsubishi *did* control NMV.

***3. Mitsubishi exerted sufficient control over NMV to satisfy* ATM Fee.**

Even if the Court does address the control prong of the exception, the relevant indicia of control are all present here and fully support the conclusion that Mitsubishi did in fact exert sufficient control over NMV to satisfy the requirements of *ATM Fee*. Factors relevant to the control inquiry include interlocking directorates, minority stock ownership, and loan agreements that subject the wholesalers to the manufacturers' operating control. *Sun Microsystems*, 608 F. Supp. 2d at 1180 (quoting *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 605 (7th Cir. 1997)). "[O]ther modes of control separate from ownership of a majority of . . . stock" are also relevant. *Sun Microsystems*, 608 F. Supp. 2d at 1180. DAPs have set forth a plethora of evidence which establishes material issues of fact concerning the presence in this case of these indicia of control.

Starting with interlocking directorates, it is hard to fathom a starker example. [redacted]

[redacted]

As to minority stock ownership, there is also really no question: [redacted] This alone granted Mitsubishi the ability to control NMV. *See* American Law Institute, *Principles of Corporate Governance* § 1.10(a) (1994) ("A 'controlling shareholder' means a person . . . who, either alone or pursuant to an arrangement or understanding with one or more other persons . . . exercises a controlling influence over the management or policies of the corporation or the transaction or conduct in question by virtue of the person's position as a shareholder.").

This [redacted] ownership interest had a very real effect on Mitsubishi's ability to control NMV: [redacted]

[redacted]

Mitsubishi's ownership and control over NMV has a precise analog to an ownership or control situation that was argued and decided in *TFT-LCD I*, 2012 WL 5869588. In *TFT-LCD I*, a vendor of finished goods (LG Electronics) held a 50% ownership interest in a joint venture which conspired to fix the prices of LCD panels. *Id.*, at *4. The court assumed that the other 50% owner (Royal Philips) was not a conspirator.[11] *Id.* In addition to the 50% ownership interest held by each of the two parent companies (one conspirator and one assumed not to be a conspirator), plaintiffs presented the court with evidence regarding maintenance of joint patents between LG Electronics and the joint venture, as well as overlapping directorates between the joint venture and its two 50% owners. *Id.* In view of those facts, Judge Illston ruled that the evidence "supports plaintiffs' contention that LG Electronics owns/controls LG Display" and held that the evidence "is sufficient to establish standing to present these claims at trial." *Id.*

[redacted]

[11] Although Royal Philips was alleged to be a coconspirator in certain LCD actions, for purposes of Judge Illston's ruling, it was assumed that Philips was not a conspirator.

Yet, with respect to this Motion, DAPs have presented far *more* evidence regarding the ownership or control relationship between Mitsubishi and NMV than was relied upon by Judge Illston in *TFT-LCD I*. For instance:

[redacted]

This evidence shows that Mitsubishi not only had the *ability* to control NMV, but that it *did in fact* control NMV. Thus, the absolute most Defendants can offer on the control question is a genuine dispute of fact about the degree to which each indicia of control is reflected by the facts of this case. The mere possibility that Defendants may (at most) be able to create a dispute of fact as to certain elements of the control inquiry only serves to show why summary judgment should be denied.

Ignoring binding Ninth Circuit precedent and numerous cases interpreting that precedent, Defendants erroneously contend that DAPs are required to "show that Mitsubishi Electric had the power to set NMV's prices." Motion at 6. Without citing any Ninth Circuit precedent, the primary authority relied upon by Defendants to support this patently incorrect legal standard for ownership or control is *In re Vitamin C Antitrust Litigation*, 279 F.R.D. 90, 101 (E.D.N.Y. 2012). Mitsubishi's reliance on *Vitamin C* misses the mark. The most obvious problem with Defendants' reliance on this case is that it blatantly ignores the legal standard for

ownership or control established by binding decisions of the Ninth Circuit—*i.e.*, *Freeman* and *ATM Fee*. It also pays no mind to the persuasive decisions of Judge Illston in *TFT-LCD I* and *TFT-LCD II*, as well as that of Judge Hamilton in *Sun Microsystems*, both of whom rejected a bright line rule that converts the ownership or control exception to one requiring the plaintiff to show that it was the defendant who actually set the prices paid by plaintiffs.[12] Simply put, the unwavering analysis in the Ninth Circuit is that what matters is the power *to oversee and exercise control* over the business decisions of an owned or controlled company. That power, binding Ninth Circuit authority holds, is evaluated through an analysis of the degree to which ownership interests or ability to control are present.

Moreover, Defendants ignore the fact that *Vitamin C* relied on a Fourth Circuit decision, *Kloth v. Microsoft Corp.*, 444 F.3d 312 (4th Cir. 2006), which had concluded that the ownership or control exception applies where the antitrust defendant has a "sufficient ownership interest in or control over the intermediary sellers to set prices along the chain of distribution." *Kloth*, 444 F.3d at 321. Thus, under *Kloth* (another non-binding authority) the question is not whether there is particular evidence that shows that the defendant *actually* "set prices along the chain of distribution," but rather whether the defendant held an ownership or control interest sufficient to allow it to do so. Thus, to the extent *Vitamin C* suggests that the Court should inquire into how prices were actually set, it is inconsistent with decisions applying the ownership or control exception, including *Kloth*, *ATM Fee*, *Freeman*, *TFT-LCD I*, *TFT-LCD II*, and *Sun Microsystems*.

In any event, even if the Court were to consider Defendants' confounding reliance on

[12] The circumstance of a defendant conspiring with a middleman to fix the prices paid by a plaintiff is the subject of the separate and distinct "coconspirator exception" to *Illinois Brick*. That exception is not at issue in this case. Yet if Defendants' proposed construction of the ownership or control standard were correct, it would mean that the coconspirator exception and ownership or control exception are one in the same, which is of course incorrect.

Vitamin C, [redacted]

Thus, even if the Court were to apply *Vitamin C* in the manner suggested by Defendants, DAPs have put forth evidence which plainly shows that the ownership or control exception is satisfied, as construed by the Eastern District of New York in that sole decision.

The record evidence in this case clearly shows that Mitsubishi both owned and controlled NMV. Defendants expressly concede facts which on their own warrant this conclusion, *see* Motion at 3, and omit without any discussion many others, *see* Section III.B, *supra*. Thus, Defendants have failed to meet their burden on summary judgment with respect to DAPs' Sherman Act standing for purchases from NMV, and DAPs respectfully submit that Defendants' Motion should be denied.

B. DAPs Have Standing for Damages Flowing From Purchases From Mitsubishi's Joint Venture Partner, NEC, Under the Ownership or Control Exception.

The purpose of the ownership or control inquiry is to permit standing where that relationship creates "no realistic possibility of suit" by the first purchaser of price-fixed goods. *ATM Fee*, 686 F.3d at 756.[13] *Freeman*, as construed by *ATM Fee*, established that standing exists where there is no realistic possibility of suit *that results from an ownership or control relationship between the first purchaser of price-fixed goods and an alleged conspirator*. *ATM Fee*, 686 F.3d at 756 (emphasis added).[14] As the Ninth Circuit observed in *Freeman*, "Defendants can't turn a horizontal agreement to fix prices into something innocuous just by changing the way they keep their books." 322 F.3d at 1146. This is exactly what Defendants are trying to do here. NEC (the first purchaser of price-fixed goods) entered into a jointly owned and controlled venture with one of the CRT conspirators, Mitsubishi, [redacted] and that ownership and control relationship had the effect of precluding any "realistic possibility of suit" by NEC with respect to the CRT conspiracy.

[13] The basis for this well-established exception is deeply rooted in long-settled case law of the Supreme Court, Ninth Circuit, and other courts of appeal: Immunizing price-fixers from federal antitrust liability would be flatly inconsistent with *Illinois Brick* and would be contrary to the well-established public policy underlying antitrust enforcement. *See Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968) ("[T]he purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."); *Royal Printing*, 621 F.2d at 325 ("The threat of private treble-damages suits is vital to the enforcement of the antitrust laws.") (citing *Illinois Brick*); *see also Loeb Indus., Inc. v. Sumitomo Corp.*, 306 F.3d 469, 483 (7th Cir. 2002) (the Supreme Court's pass-on jurisprudence "at times favors plaintiffs (*Hanover Shoe*) and at times defendants (*Illinois Brick*), but it never operates entirely to preclude market recovery for an injury").

[14] Judge Illston's analysis in *TFT-LCD II* is also instructive on this point. There, Defendants argued on summary judgment that certain of the plaintiffs' purchases were not made from vendors that had an ownership or control relationship with an alleged conspirator. *TFT-LCD II*, 2012 WL 7062366, at *3. Judge Illston concluded that summary judgment was appropriate only with respect to vendors as to which plaintiffs failed to make "any showing that the vendor and the seller have an ownership/control relationship." *Id.*, at *4.

DAPs' assertion that the ownership and control relationship precluded any "realistic possibility of suit" is fully supported by the evidentiary record. [redacted] The lack of a "realistic possibility of suit" is not mere supposition or conjecture, but reality: over the past seven years since the CRT conspiracy was first made public, NEC has not sued Mitsubishi or any other conspirator for the CRT price-fixing conspiracy. Not in the United States, not in Asia, not in Europe—nowhere. Thus, any suggestion by Defendants that there is a "realistic possibility of suit" by NEC rings utterly hollow, and is simply inconsistent with the record evidence surrounding the ownership and control relationship between Mitsubishi and NEC, as well as NEC's own undisputed actions.

Defendants also conveniently ignore the fact that NEC—like Mitsubishi—was a participant in the LCD conspiracy and benefited from the LCD conspiracy through the joint ownership and control relationship over NMV. *See* Costco LCD trial verdict (Exh. 10) at 2; Best Buy LCD post-trial decision (Exh. 11) at 4 n.3. Indeed, NMV manufactured and sold LCD monitors that incorporated LCD panels that NEC and others price-fixed, and just as with NMV's CRT product sales, NEC and Mitsubishi both reaped the profits [redacted]. Moreover, the LCD cartel—which spawned litigation resulting in billions of dollars in civil suit settlements plus over one billion dollars in fines by the DOJ alone (to say nothing of fines imposed by foreign governmental bodies)—involved many of the same participants as the CRT cartel. The LCD case involves precisely the same legal issues as this case and features similar

damages analyses. In addition, the plaintiffs in the LCD civil lawsuits are claiming Sherman Act standing based upon their purchases from NEC, Mitsubishi, and NMV. As a result, the same ownership or control relationship (*i.e.*, Mitsubishi and NEC's joint ownership and control over NMV) is implicated as to the prosecution of both the LCD and CRT cartels. In light of this backdrop, it is hardly credible for Defendants to suggest that NEC somehow might be willing to sue its LCD and CRT joint venture partner for the CRT conspiracy.

Simply put, whether the ownership and control relationship between Mitsubishi and NEC was such that there was a "realistic possibility of suit" is an issue to be decided by the trier of fact. Defendants may dispute the precise amount of weight that should be assigned to the record evidence that DAPs have presented (*e.g.*, [redacted] or the fact that NEC fixed the prices of LCD panels—[redacted] But the existence of such a question of fact as to how the evidence should be weighed, or how factual disputes should be resolved, only serves to highlight that summary judgment is inappropriate. Defendants will have their opportunity to argue to the trier of fact how to weigh and interpret the evidence put forth by DAPs. They will also have an opportunity to put forth evidence of their own—evidence that is notably absent from their Motion—which they may argue supports a contrary factual conclusion. But such a factual dispute is not one that can be resolved on summary judgment, and Defendants' Motion should be denied.

CONCLUSION

For the foregoing reasons, DAPs respectfully request that the Court deny Defendants' Motion.

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Respectfully submitted,

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